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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1928

No. [redacted] 13

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,

Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,

Appellee.

BRIEF FOR APPELLANTS.

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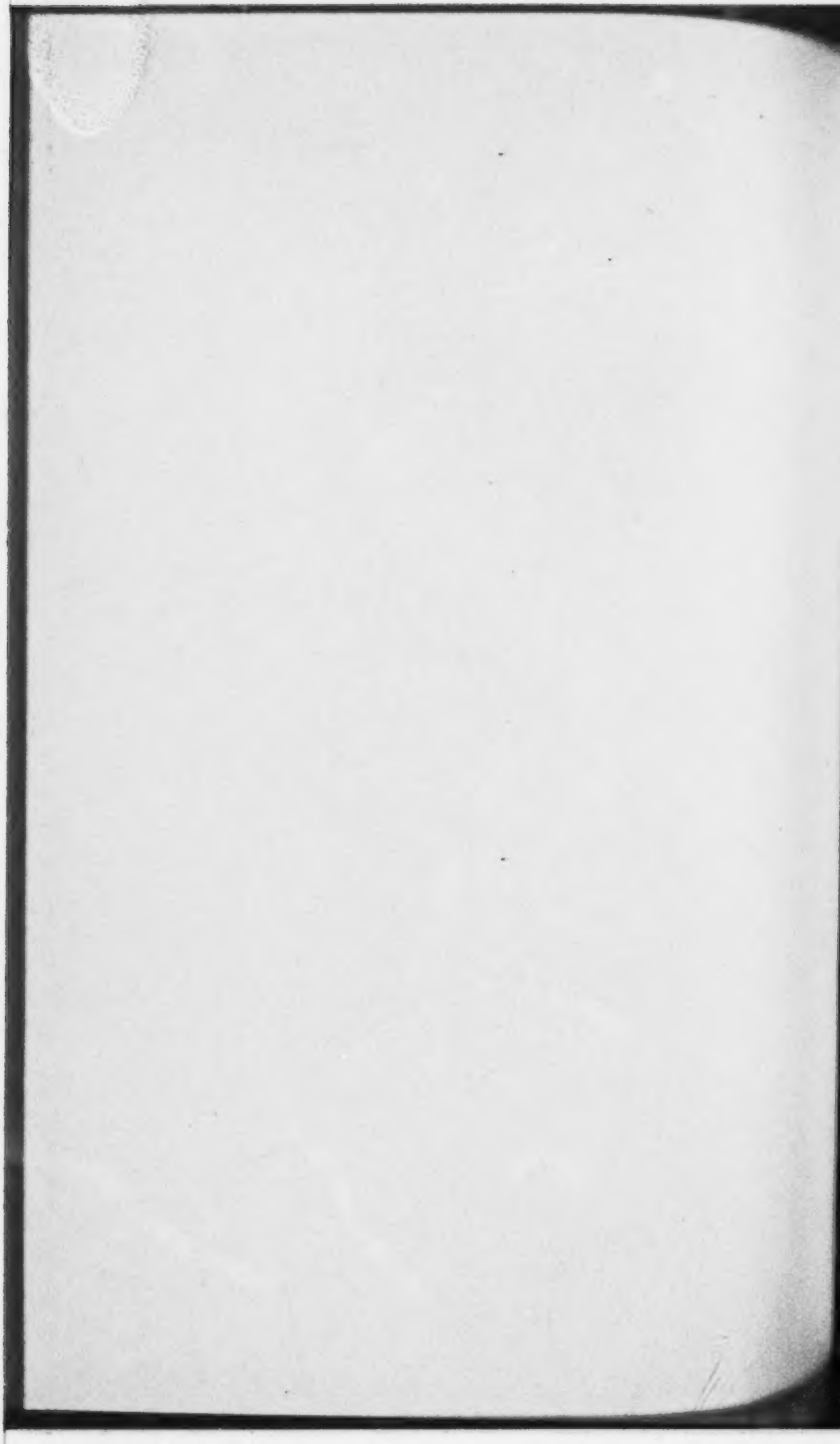

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No. 530

BEKINS VAN LINES, INC.; CHEW CHICK, doing business as Bay City Hauling Co.; KENNETH C. CLARK, et al.,
Appellants,

vs.

RAY L. RILEY, as State Controller of the State of California,
Appellee.

BRIEF FOR APPELLANTS.

STATEMENT OF THE CASE.

In 1923 the legislature of California first enacted a statute providing for the assessment and levy of a highway transportation tax, to be collected annually from all persons, firms, associations and corporations who operate motor vehicles upon any public highway in the state and thereby engage in the transportation of persons or property for hire or compensation. The tax was a four per cent gross receipts tax based upon

the annual gross receipts of the operator for the year preceding the tax year. The statute exempted certain classes of operators, the principal exemptions being (1) those operating various motor vehicles within incorporated cities or towns and not over any portion of any state or county highway; (2) sight seeing busses; and (3) operators who derived as much as fifteen per cent of their gross receipts from United States mail contracts. The tax was a commutated or substituted state tax in lieu of all licenses on the business and local taxation on the property of the operator used exclusively in the business of transporting persons or property for hire over the public highways and was dedicated entirely to the maintenance and repair of said highways, one-half of said tax being retained by the state for such purposes and the remaining one-half thereof being apportioned among the fifty-eight counties of the state for like purposes, the percentage of apportionment being determined by the number of registered automobiles in each county. (*Statutes of California,* 1923, Chapter 341, page 706.) The constitutionality of this act, with the exception of certain exemptions, to which we will advert later in this brief, was sustained by the Supreme Court of the state in *Bacon Service Corporation v. Huss,* 199 Cal. 21. This Court denied a writ of certiorari. (*Bacon Service Corp. v. Huss,* ..... U. S. ....., 72 L. Ed. 224 Ad. Op. Memo.)

In 1925 this act was superseded by a statute similar in import, form and effect enacted to remedy certain constitutional objections to the earlier statute. (*Sta-*

utes of California, 1925, Chapter 412, p. 833, Appendix hereto p. i.) The constitutionality of this latter act was sustained by the state Supreme Court, in *Re Schmolke,* 199 Cal. 42; and this Court denied a writ of certiorari. (*Schmolke v. O'Brien* (Mem.), 273 U. S. 646, 47 S. Ct. Rep. 244, 71 L. Ed. 820.)

On the 2nd day of November, 1926, there was adopted by the people of the State of California, at a general election held on said date, an amendment to the Constitution of said state known and designated as Assembly Constitutional Amendment No. 37, proposed by the legislature of said state, filed in the office of the Secretary of State of California on the 27th day of April, 1925, and contained in Chapter 60, 1925 Statutes of California, and page lxxxviii, Statutes of 1927 of said state, identified as and becoming Section 15 of Article XIII of the Constitution of said state. (App. pp. xii-xvi.)

In order to carry into effect and fully enforce the said constitutional amendment the legislature of said state duly passed an act at the 1927 session thereof entitled: "An act to add three new sections to the Political Code to be numbered three thousand six hundred sixty-four aa, three thousand six hundred seventy bb and three thousand six hundred seventy cc, relating to taxation of highway transportation companies for state purposes," which act was duly approved by the Governor of said state on the 5th day of March, 1927, and went into effect immediately; said act being Chapter 19 of the 1927 Statutes of California. (App. pp. xvi-xxiv.)

At the same session of the legislature the Act of 1925 hereinbefore referred to was repealed, (Statutes of California, 1927, Chap. 843, p. 1708; App. p. xi) thus leaving the constitutional amendment and the statute enacted to carry same into effect as the only legislation providing for the assessment, levy and collection of a highway transportation tax.

The legislation of 1927 provides for an annual tax of *four and one-quarter per cent* on the yearly gross receipts of motor vehicle operators coming within the definition of the act carrying express matter and passengers and their baggage, and *five per cent* on the yearly gross receipts of such operators carrying property or freight, in lieu of all other state, county and municipal taxation, and exempts such carriers from all licenses and local taxation appertaining to the business and property of the operators when such property is used exclusively in the business of carrier.

The portions of said legislation vitally affecting this case read as follows:

> "Sec. 15. Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word 'companies,' as used in this section, shall include per-

sons, partnerships, joint stock associations, companies and corporations.

"(a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

"All such companies operating trucks or auto trucks engaged in the business of transporting property shall anually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state.

"Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies, provided, that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state." (Sec. 15, Art. XIII, Constitution of California; App. pp. xii-xvi; California Political Code, Sec. 3664 aa; App. p. xvi.)

This legislation does not provide for the payment of a highway transportation tax by any carrier using the public highways in the state for the carriage of persons or property for hire or compensation, except

common carriers operating between *fixed termini* or over a *regular route.* Under the existing legislation all other carriers for hire are free to use said highways indiscriminately without such taxation, except the payment of comparatively nominal license fees and local taxation the annual amount of which in the aggregate does not exceed twenty-five per cent of the amount of the highway tax. (R. p. 7, fols. 8, 9.)

Each of the appellants herein is classed by the State Railroad Commission and the State Board of Equalization, respectively, of the State of California, as a common carrier transporting freight or property, over the public highways in said state between fixed termini or over regular routes, for hire, and as such classified common carrier each of them holds, and operates over said public highways by virtue of, a certificate of public convenience and necessity issued by said State Railroad Commission, and as such classified common carrier each of them is subject to the operative limitations prescribed by the laws of said state and the rules and regulations of said Railroad Commission made in pursuance thereof (Chapter 213, p. 330, 1917 Statutes of California.) (R. p. 3, fol. 4.)

Between the first Monday in March, 1928, and the third Monday before the first Monday in July, 1928, the State Board of Equalization of California, in the manner provided by law, assessed and levied against each of the plaintiffs herein the said highway tax of five per cent of the gross receipts derived from operations by each of them during the preceding year, said tax covering the fiscal year beginning July 1, 1928, and

ending June 30, 1929, and aggregating $39,090.66; and the appellee, as Controller of the State of California, acting under the authority vested in him by the laws of the state notified the appellants that unless they paid the said tax by July 2, 1928, he would seize and sell a sufficient amount of their property to pay the tax with penalties and costs. (R. p. 12, fol. 15.)

Thereupon, the appellants on the 21st day of July, 1928, commenced this action to enjoin the enforcement of the tax, and to declare the legislation, including the constitutional amendment, on which the tax is based, to be discriminatory and in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States and prayed for an interlocutory and permanent injunction. (R. p. 14, fol. 18.) A motion for an interlocutory injunction was duly and regularly made in the District Court before three federal judges and by them denied. (R. p. 19, fols. 33, 34.) The motion was made on the verified bill of complaint. The appellee demurred to the bill by a motion to dismiss. (R. p. 18, fol. 27.) This appeal is prosecuted to this Court from the decree entered denying the motion for an interlocutory injunction and dismissing the bill. (R. p. 20, fol. 35.)

No opinion was rendered or filed by the lower court.

The grounds of appellants' motion and of this appeal and the admitted facts in support thereof can be most concisely stated by quoting from portions of appellants' bill of complaint, as follows:

> "That said constitutional amendment and the said act provide, among other things, that the

taxes to be assessed, levied and collected as therein provided shall be entirely and exclusively for highway purposes; that said taxes shall be in lieu of all other taxes and licenses, state, county and municipal upon the property of the common carriers hereinbefore described used exclusively in the operation of their transportation business in said state; provided that nothing therein shall be construed to release such common carrier from the payment of any amount required to be paid for any special privilege or franchise theretofore granted by any of the municipal authorities of said state; that revenues derived from said taxes shall be deposited in the general fund of said state; that one-half thereof are appropriated and set aside to said state to be devoted exclusively to the maintenance and repair of public highways within the State and that the remaining one-half thereof shall be apportioned among and distributed to the respective fifty-eight counties of said state in the proportion that the number of motor vehicles registered within each county for the preceding calendar year bears to the total number of motor vehicles registered in said state, and the sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within said counties; that the gross receipts upon which said taxes shall be computed shall be the gross receipts for the calendar year preceding the year in which said assessment and levy are made and that said taxes shall become a lien on all of the property covered by said tax on the first Monday in March of each year after the adoption of said constitutional amendment and shall become due and payable annually on the first Monday in July thereafter; that certain enumerated sections of the Political Code of said state already in effect shall apply and be construed to apply to all common carriers subject to said tax with the same force and effect as if said common carriers were therein exclusively mentioned." (R. p. 6, fols. 7, 8, 9.)

"That said highway taxes provided for by said constitutional amendment are assessed and levied against, and the collection of said tax is limited to, only common carriers transporting persons or property for compensation over any public highway in the state between fixed termini, or over a regular route, excluding school busses when operated by school districts, and are not intended to apply and do not apply and have not been applied to common carriers not operating between fixed termini or over a regular route, transporting persons or property for compensation over any public highway in the state, nor to exclusive contract or private carriers operating for compensation over the same highways, nor to any other class of carriers using said highways; and that such common carriers not operating between fixed termini or over regular routes and such contract or private carriers and all other classes of carriers using said highways are entirely excluded from the payment of said highway taxes and pay no state taxes other than a corporate franchise tax assessed on the basis of the full cash value of such corporate franchise, if they be corporations, but not otherwise, license taxes hereinafter more particularly mentioned, and in addition thereto local, county and municipal taxes hereinafter more particularly mentioned." (R. p. 7, fols. 8, 9.)

"That the major portion of the transportation business of most of plaintiffs herein is limited to the transportation of farm products consisting of fruits and vegetables, mostly perishable, grown in the Santa Clara, Watsonville, Pajaro, Salinas and adjacent valleys situated south of San Francisco Bay, to the San Francisco fruit and produce commission market; that because of the nature of the commodities transported and the necessity for rapid transit said commodities are picked up and loaded on the farms, ranches and orchards where produced and carried into the San Francisco market over the public highways usually

between sunset and sunrise to the great advantage and convenience of producer, middleman and consumer and is a service that could not be so rendered by any other existing form of carrier; that the busiest season of the year for plaintiffs and all other common and contract or private carriers operating within said state over the public highways, commences in the late spring and ends in the early fall; that principally during said season of the year and also in a less degree at other times, a large number of motor vehicle common carriers and contract or private carriers, to the extent of at least five hundred operators transporting property for hire over the public highways in California, that do not come within the definition of the common carriers taxed under said constitutional amendment and said act, enter into direct and keen competition with the various plaintiffs herein in the transporting of commodities or property over the public highways of said state; that said common and contract or private carriers not subject to said highway tax are also not subject to regulations as to route, termini, period of operation, or in any other respect by the State Railroad Commission or any other public state authority, and are not required and do not pay an average annual total of local, municipal, county and state taxes and licenses, excepting none, and of every kind combined, in excess of twenty-five per centum (25%) or one-fourth (¼) of the amount of the gross receipts or highway tax required to be paid annually by the respective plaintiffs herein where said plaintiffs and the said excluded or non-taxable carriers each use exclusively in said business over the same routes and in direct competition under like conditions, a total taxable operative property of equal full cash or assessable value; that the same average difference between all combined taxes and licenses of every kind as aforesaid required to be paid by all carriers not subject to said highway tax and common carriers subject to said highway tax op-

erating over competitive routes, with taxable operative property of equal full cash or assessed value, prevails throughout the State of California, namely, that said common carriers operating in California subject to said highway tax are thereby assessed and obligated to pay an average of four times the amount of taxes, notwithstanding their exemptions from all other kinds of taxes, that all other highway carriers for compensation not subject to said tax are assessed and obligated to pay for all local, municipal, county and state taxes and licenses of every kind combined; that the average full cash value of operative property, that is to say, of all property used exclusively in said business of carrier, of all common carriers and of all private or contract carriers that operate over the public highways of California carrying property for compensation is not in excess of one fourth (¼) or twenty-five per centum (25%) of the average annual gross receipts derived from such business by said carriers." (R. p. 7, fols. 9, 10, 11.)

"That the average total annual rate or percentage of taxes that carriers not subject to said highway tax operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind combined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to plaintiffs herein on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced." (R. p. 9, fol. 11.)

"That said gross receipts tax is purely and solely a tax for highway purposes apportioned between the state and the various counties of the state of California to be devoted exclusively to the maintenance and repair of public highways;

that the aforesaid competitors of plaintiffs operating as contract or private carriers and common carriers of property for hire over the said public highways not subject to said tax use the said public highways in the same manner, to the same degree, with same type of vehicles, employ the same methods of operation and have the same source of receipts as the plaintiffs and are in direct and keen competition with plaintiffs; and that said tax is therefore arbitrary, oppressive, unjust, unlawful, illegal, discriminatory and burdensome, and is not justified by reason of any difference in the source of receipts or in the situation or character of the property employed by the common carriers subject to the tax and by those carriers for hire not subject to the tax, and it is therefore class legislation and denies to the plaintiffs the equal protection of the laws in violation of Section 1, Article XIV of the Amendments to the Constitution of the United States." (R. p. 9, fol. 12.)

"That the common carriers subject to said tax are subject to control by said Railroad Commission as to termini and routes, kind of transportation carried, class of vehicles used, term or period of operation and other similar regulations while said competitive common carriers and contract or private carriers—not subject to said tax using said public highways for hire are free from said limitations, restrictions and regulations, thus affording the latter classes of carriers freedom of action with respect to choice of business, routes, seasonal operations and all other regulations enforced by said State Railroad Commission against plaintiffs, which liberty of action said classes of carriers do now freely exercise, and which the plaintiffs herein do not possess and do not and cannot exercise, and the said non-taxable classes of carriers for hire are permitted to and do use and enjoy, and derive their income exclusively from the use and enjoyment of said public highways without paying any part or portion of the

said highway tax or without contributing in any manner toward the maintenance or repair of said public highways beyond what all owners and operators of motor vehicles that do not enjoy or use said public highways as carriers for hire contribute toward their maintenance and repair, to the unfair and great injury and damage of plaintiffs and which will, if allowed to continue, amount to a confiscation of the property and business of the plaintiffs and render plaintiffs insolvent; and that said highway tax is thereby made a double burden on the free and equal competition of plaintiffs with said carriers for hire not subject to said tax and is an unlawful, void and illegal tax and unjustly discriminates against plaintiffs thereby denying to plaintiffs the equal protection of the laws in violation of Section 1 of Article XIV of the Amendments to the Constitution of the United States." (R. p. 10, fols. 12, 13.)

"That plaintiffs are afforded the right by statute to pay said taxes under protest on the ground of illegality and to thereafter bring suit against the Treasurer of the State of California for the recovery of such taxes; that no provision is made for the payment of interest on such taxes paid under protest during the pendency of such suit; that no provision is made by law for the payment of any judgment so recovered; that such judgment cannot be collected by execution against the state or its property or by any of the ordinary processes of law provided for the enforcement of judgments; that no provision for the payment of such judgment so recovered can be made except by specific and separate appropriation and legislation by the legislature of said state in such manner and at such time as it sees fit and that it may at its pleasure refuse to do so; that said taxes are required to be paid into the general fund of said state and within three months thereafter one-half the amount of said collected taxes is required to be apportioned and

distributed among the fifty-eight counties of said state; that said taxes could not therefore be traced and refunded by said state treasurer if he had the legal authority to do so in satisfaction of any judgment so recovered; that to recover the one-half of said taxes paid to said counties the plaintiffs would be obliged to institute separate and distinct suits against said counties thereby causing a multiplicity of suits; that the integrity and success of the business of plaintiffs depends upon a continuity of service and that if said property of plaintiffs is seized and sold at public auction by said defendant, plaintiffs will be deprived of the opportunity to transact business therewith and their routes, patronage and business will be thereby wholly disrupted, destroyed and lost beyond recovery or rehabilitation; that no relief or satisfaction in damages could be obtained against said defendant to compensate plaintiffs for the loss of their property, routes, patronage and business, and it would be extremely difficult to compute or estimate the amount of such damages; that if said taxes are not paid on or before the sixth Monday after the first Monday in July, 1928, one-half the amount thereof is subject to a penalty equal to fifteen per centum (15%) of the amount thereof and will be added thereto, and an additional penalty of five per centum (5%) will be added to the amount remaining unpaid on the first Monday in February, 1929; that if said taxes are not paid on or before the Saturday preceding the first Monday in March, 1929, the plaintiffs herein that are corporations will have their respective corporate rights, powers and privileges suspended and thereafter will be incapable of exercising the same." (R. pp. 12, 13, fols. 16, 17.)

"That the amount of tax fairly and equitably due from each of the plaintiffs herein is twenty-five per centum (25%) of the respective amounts assessed, levied and attempted to be collected from each of said plaintiffs herein as hereinbefore alleged; and that said plaintiffs are ready,

willing and able, and each of them does hereby offer to pay into court a fair, just and non-discriminatory tax in the premises which plaintiffs allege to be said twenty-five per centum (25%) of said respective annual gross receipts taxes, upon the granting of an injunction herein." (R. p. 14, fol. 17.)

We are permitted to add with consent of the Attorney General that prior to the commencement of this suit the appellants had informed the appellee that they were prepared to tender twenty-five (25%) per cent of the amount of said tax as a just amount due the state and that the appellee informed the appellants that it was useless to make such tender as he would not accept the same, and that the only tender he would consider or accept was the whole amount of the tax, hence the offer was made to pay the amount into Court, as alleged in the bill. (R. p. 14, fol. 17

ASSIGNMENTS OF ERROR.

The only assignments of error that appellants shall urge on this appeal are as follows:

I.

That the Court erred in deciding that plaintiffs' bill of complaint does not state facts sufficient to constitute a cause of action against the defendant herein or to entitle plaintiffs or any of them to the whole or any part of the relief prayed for in said bill. (R. p. 20.)

VII.

That said Court erred in deciding that the granting of the interlocutory injunction applied for will

seriously injure and embarass the State of California in the administration of its revenue laws and in the conduct of its govermental affairs. (R. p. 21.)

VIII.

That said Court erred in deciding that the assessments and levies against the plaintiffs are valid. (R. p. 21.)

IX.

That said Court erred in deciding that Section 15 of Article XIII of the Constitution of California is not contrary to the Fourteenth Amendment or any provision of the Constitution of the United States. (R. p. 21.)

X.

That said Court erred in deciding that Section 15 of Article XIII of the Constitution of the State of California and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of said state constitution and said statute enacted to carry same into effect apply only to common carriers operating for compensation between fixed termini or over regular routes over the public highways of said State of California, and do not apply to all other classes of common carriers and to private or contract carriers using the said public highways under like conditions and in competition with the plaintiffs herein. (R. p. 22.)

XI.

That said Court erred in deciding that Section 15 of Article XIII of the Constitution of the State of California, and Chapter 19 of the 1927 Statutes of California enacted to carry said section of said state constitution into effect are not discriminatory or arbitrary or oppressive or unlawful or illegal or unconstitutional or burdensome notwithstanding that said section of the constitution of said state and said statute enacted to carry same into effect provide that and require the plaintiffs to pay in taxes a sum equal to an average of four times the amount of local, county, municipal and state taxes and licenses of all kind combined exacted from and required to be paid by their competitor carriers excluded from the aforesaid constitutional and statutory classification and using said public highways as such carriers under like conditions, in competition with the plaintiffs herein. (R. p. 22.)

XII.

That said Court erred in deciding that the five *per centum* gross receipts highway tax provided for in said section of the said state constitution and in said Chapter 19 of the 1927 Statutes of California and the assessment and levy thereof made against the plaintiffs herein, and the attempt to enforce the collection thereof against said plaintiffs and their property are not a double or discriminatory burden on the free and equal competition of the plaintiffs herein with all classes of carriers for compensation not subject to said tax and using the said public highways in competition with said plaintiffs. (R. p. 22.)

XIV.

That said Court erred in deciding that the enforcement of said state constitutional amendment and the aforesaid statute enacted to carry same into effect and the collection of said tax would not deprive plaintiffs of their property without due process of law. (R. p. 23.)

Although the lower Court rendered no opinion in deciding the motion for interlocutory injunction, thus failing to indicate the basis of its decision and ordinarily requiring the complete briefing of all the points covered by the assignment of errors, it will not be necessary to do so in this case for the reason that the appellee has stipulated that he does not intend to argue the matters covered by the remaining assignments of error.

The effect of this stipulation is to require the briefing and argument of but one proposition, into which all of the assignments of error above quoted and intended to be urged may be grouped, namely:

The constitutional amendment and the statute enacted to carry same into effect are discriminatory and deny to appellants the equal protection of the laws.

ARGUMENT.

The State Constitutional Amendment and the statute enacted to carry same into effect are discriminatory for the following reasons:

1. The classification excludes all carriers except specially defined common carriers using the public

highways to transport persons or property for hire or compensation even when the excluded carriers are in direct competition with the common carriers subject to the tax and when there is no difference in the source of their receipts or in the situation a character of the property employed by them.

2. The classification excludes all common carriers except common carriers operating between fixed termini or over regular routes.

3. The legislation discriminates unjustly between the carriers of freight and the carriers of passengers, taxing the former 5% and the latter 4¼% on their annual gross receipts.

4. The tax is a highway tax dedicated exclusively to the maintenance and repair of the state and county highways and therefore should, but it does not, apply equally to all carriers using the state and county highways in the business of transporting persons or property for hire or compensation.

5. The carriers for hire not subject to the tax do not pay an equivalent in other taxes, but on the contrary pay annually in the aggregate for all taxes and licenses of every kind combined a sum that does not average more than 25% of the amount of annual taxes paid by appellants under the legislation in question.

Since the points specified under subtitles 1, 2, 3 and 4 are corelated and interdependent we shall discuss them as one proposition.

(a) *The legislation is discriminatory.*

Prior to the constitutional amendment in question making common carriers operating between fixed termini or over regular routes subject to a gross receipts highway tax, there had previously been enacted by the legislature of California two statutes levying a similar tax, one being the Act of June 13, 1923, Statutes of 1923, page 706, and the other a statute similar in form and effect, being the Act of 1925, Statutes of 1925, page 833. (App. p. i.)

These two acts included "all persons, firms, associations, and corporations who operate motor vehicles upon any public highway in this state and thereby engage in the transportation of persons or property for hire or compensation"; but the Act of 1923 exempted certain classes, the three principal exemptions being (1) various motor vehicles operating within incorporated cities or towns and not over any portion of any state or county highway; (2) sight seeing busses and (3) operators who derived as much as fifteen per cent (15%) of their gross receipts from United States mail contracts. The constitutionality of this act of 1923 was determined by the Supreme Court of California in the case of *Bacon Service Corporation v. Huss,* 199 Cal. 21. The state Supreme Court held that the Act was constitutional so far as it exempted those operating within the limits of municipalities, for the reason that *"highways within the municipalities were usually not maintainable directly at the expense of the state but from municipal revenues"* but it held that sight-seeing

motor vehicles conceded to operate in county territory outside of incorporated cities, could not be constitutionally exempted and in so deciding, it said, at page 31:

> "There appears to be no natural or intrinsic and certainly no constitutional distinction between the use of the public highways by the vehicles of the respondent and the same use by sight-seeing busses regularly using the highways of the state outside of municipalities in the business of transporting persons or property for hire."

The state Supreme Court also held in that case that United States mail contract carriers could not be arbitrarily classified as being excluded from this tax and so deciding, it held at page 31:

> "It is difficult to perceive how this exemption may be justified when it relieves from the burden of the license tax those operators who conduct a motor-bus business outside of municipalities and who perchance may have acquired a government contract for the carriage of mail from which they derive at least fifteen per cent of their gross receipts. Under this exemption the entire revenues of such operators derived from business exclusive of mail contracts—and which may be as much as eighty-five per cent of their gross receipts— are relieved from the deduction of four per cent license tax while a like percentage of the gross receipts of those operators of the same class having no mail contracts are subjected to the tax. We see no legally justifiable basis for the distinction. It will be noted that the statute does not merely exempt the mail contract revenues from the license tax or four per cent but exempts the entire revenues of such operators from the requirements of the act. *We think that the exemption of sight-seeing motor-busses operating*

outside of municipalities and the exemption of the entire revenues of operators a part but not all of whose business embraces the carriage of United States mail and parcels post by contract were not based on any properly cognizable theory of classification."

In both the 1923 and 1925 highway transportation tax acts there was a saving clause providing that if any section, subsection, sentence, clause or phrase of the act should be held unconstitutional it was still the intention of the legislature that the remainder of the acts should be operative. Because of the saving clause in each of said two acts the state Supreme Court sustained the validity of the two respective acts, although deciding certain provisions in each of them to be unconstitutional and invalid.

Such saving clause only raised a presumption of divisibility.

Williams v. Standard Oil Co., 73 L. Ed. Adv. Op. pp. 141, 143, decided Jan. 2, 1929.

In the case at bar, however, neither the constitutional amendment nor the statute enacted to carry same into effect contains any saving clause, and it is quite apparent from the context of the constitutional amendment and the statute that they were intended to be effective as an entirety. It is plain from the language used in both of them that it was the intention to make the tax apply to only such common carriers as were subject to the jurisdiction of the Railroad Commission. In fact if the classification section is eliminated from the amendment and statute in question what is left would be but an empty shell.

"In the absence of such legislative declaration [a saving clause] the presumption is that the legislature intends an act to be effective as an entirety."

Williams v. Standard Oil Co., supra, at p. 143.

"If different sections of a statute are independent of each other, that which is unconstitutional may be disregarded, and valid sections may stand and be enforced. But if an obnoxious section is of such import that the other sections without it would cause results not contemplated or desired by the legislature, then the entire statute must be held inoperative."

Connolly v. Union Sewer Pipe Co., 184 U. S. at p. 565, 46 L. Ed. at p. 692.

We respectfully suggest to this Honorable Court that it should be noted that the Act of 1923 held in part to be unconstitutional, as above specified, was a commutated or substituted tax in lieu of all local taxation exactly as the constitutional amendment and legislation in controversy provides for a commutated or substituted tax.

It will also be noted that the Acts of 1923 and 1925 included all classes of carriers regardless of whether they were within or without the jurisdiction of the State Railroad Commission, except the exceptions above specified.

The Act of 1925, which applied to *all types of carriers for hire* was repealed by the legislature in 1927, Statutes of 1927, page 1708, effective January 1, 1928, (App. p. xi), thereby leaving the constitutional amendment, and the executing legislation as the only law and statute imposing a gross receipts tax on highway carriers and thereby freed the private or contract

carriers and the common carriers not operating between fixed termini or over regular routes, from any further gross receipts tax.

The amendment to the Auto Stage and Truck Transportation Act, 1919 Statutes of California, Chapter 290, page 458, under which act the Railroad Commission takes jurisdiction of freight carriers, subsection (e), gives the Railroad Commission final jurisdiction to determine as a question of fact what operators do business between fixed termini or over a regular route. Said subsection (e) reads as follows:

> "(e) The words 'between fixed termini or over a regular route,' when used in this act, mean the termini or route between or over which any transportation company usually or ordinarily operates any automobile, jitney bus, auto truck, stage or auto stage, even though there may be departures from said termini or route, whether such departures be periodic or irregular. Whether or not any automobile, jitney bus, auto truck, stage or auto stage is operated by a transportation company 'between fixed termini or over a regular route' within the meaning of this act shall be a question of fact and the finding of the railroad commission thereon shall be final and shall not be subject to review."

It is also to be noted from said Auto Stage and Truck Transportation Act, Statutes of 1919, *supra* that the legislature attempted to give the Railroad Commission jurisdiction over all operators using the public highways for compensation, for its provides in subsection (c) of section (1) as follows:

> "(c) The term 'transportation company,' when used in this act means every corporation or person, their lessees, trustees, receivers or trus-

tees appointed by any court whatsoever, owning, controlling, *operating or managing, any* automobile, jitney bus, auto truck, stage or auto stage *used in the business of transportation* of persons or property, *or as a common carrier,* for compensation, over any public highway in this state between fixed termini or over a regular route, and not operating exclusively within the limits of an incorporated city or town or of a city and county; *provided,* that the term transportation company,' as used in this act, shall not include corporations or persons, their lessees, trustees, receivers or trustees appointed by any court whatsoever, in so far as they own, control, operate or manage taxicabs, hotel busses or *sightseeing busses,* or any other carrier which does not come within the term 'transportation company' as herein defined."

Sightseeing busses were there excluded from the jurisdiction granted, but private or contract carriers were attempted to be included. In the case of *Frost v. Railroad Commission,* 240 Pac. 27, 197 Cal. 230, the Supreme Court of California held that the said Act as amended in 1919 gave the Railroad Commission jurisdiction over private or contract carriers. In advancing grounds for holding that these private or contract carriers should rightfully be subject to the control of the Railroad Commission, the State Supreme Court used almost prophetic language so far as the contention of the appellants in this action that they are unfairly discriminated against in favor of private or contract carriers is concerned. We quote excerpts from that opinion which constitute the very basis of the grievances of the appellants in this case, that the tax as assessed and levied is an unfair discrimination, as follows:

"The rule * * * rests equally upon the circumstance that he (the carrier) is using the public highways as the chief instrumentality of a private business conducted for private gain. In other words, he is enjoying a special privilege in the highways which are constructed and maintained at public expense and designed for the common use of all."

Frost v. Railroad Commission, supra.

"We are of the opinion that the state has the right in the granting of such special privileges in its public highways to require that the recipient thereof in consideration therefor return a reasonable *quid pro quo* to the public."

Frost v. Railroad Commission, supra.

"It is at once apparent that the private carrier is or at least may be in direct competition with the public carrier, who is operating over the same route, and whose business it is the duty of the commission to supervise and regulate."

Frost v. Railroad Commission, supra.

"By this means they could take away from their competitor, who is operating as a common carrier under the restrictions and limitations imposed by the act, all of the most profitable and least burdensome of his business leaving him obligated to carry the unprofitable remainder thereof, and thus disable him to render the service which the public interest requires."

Frost v. Railroad Commission, supra.

It will thus be seen that any argument the learned Attorney General may advance to the effect that the appellants are protected from unfair competition by the fact that they are subject to the jurisdiction of the Railroad Commission, is without merit. Not

only are the appellants obliged to adhere to a fixed schedule of charges, rates and routes, and limited to certain classes of commodities which they may transport, and in other respects limited in their activities by the regulations of the Railroad Commission, but the contract or private carriers as well as the so-called "wildcats" or common carriers periodically operating during the busy seasons of the year and not following any regular routes or operating between fixed termini, are free from this heavy burden of gross receipts taxation and are also entirely free from restraint by the Railroad Commission. Undoubtedly the legislature intended to control them by the amendment to the Auto Stage and Truck Transportation Act of 1919, *supra,* and the Supreme Court of California believed that they should be so restrained by the Railroad Commission, but this Honorable Court in the case of *Frost v. Railroad Commission,* 271 U. S. 583, 70 L. Ed. 1101, 46 Sup. Ct. Rep. 605, held that the legislature of California could not impress, by legislation of any kind, the status of a common carrier upon a private or contract carrier and reversed the decision of the State Supreme Court that such carriers were subject to the jurisdiction of the Railroad Commission.

The tax should have been made to apply to any person operating any motor vehicle used on the public highways in the *business* of transportation of persons or property for hire *or* as a common carrier for hire. That would have brought all carriers using the public highways for compensation within the purview of the tax. When the sole object of the tax is considered,

namely, the maintenance and repair of the highways out of the revenues of those using the highways for hire all such carriers stand in the same relation to the law. There is no difference in the source of their receipts or in the situation or character of the property employed.

That the California State Board of Equalization, to which commission is entrusted the assessment and levy of the tax in controversy, itself realizes the discriminatory nature of the legislation imposing the tax, is evidenced by its last official report addressed to the Governor of the state. We quote from pages 16 and 17 of that report:

> "Although the present form of taxation on these companies is a distinct improvement over the former motor vehicle transportation license tax (repealed in 1927), there are certain inequalities existing under the present law which should be removed. *This tax is restricted to companies operating as common carriers over a regular route or between fixed terminals; the classification excludes from its purview the operations of those hauling under contract and those carrying on a spasmodic business in different sectors. Frequently, such operators come into direct competition with highway transportation companies and cause disastrous diminishment of the revenues of the latter, inasmuch as the contract haulers are not subject to as heavy taxation and, therefore, feel at liberty to cut rates.*"
>
> Report of the California State Board of Equalization for 1927-1928. (State Printing Office, Sacramento 1928.)

"The equal protection clause does not detract from the right of the state justly to exert its taxing power or prevent it from adjusting its

legislation to differences in situation or forbid classification in that connection, 'but it does require that the classification be not arbitrary but based upon a real and substantial difference having a reasonable relation to the subject of the particular legislation.'"

Quaker City Cab Co. v. Pennsylvania, 72 L. Ed. 607, Advance Opinions; decided May 28, 1928;

Power Mfg. Co. v. Saunders, 71 L. Ed. 1165, 274 U. S. 490.

The instant case is almost identical with the case of *Quaker City Cab Co. v. Pennsylvania, supra,* recently decided by this Court. In that case the State of Pennsylvania levied a gross receipts tax on the earnings of incorporated taxicab companies but excluded natural persons and partnerships from liability for the tax. In deciding the tax to be discriminatory and a violation of the federal constitution this Court said:

"No doubt there are situations in which, as appears in Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 62 L. Ed. 827, 138 Sup. Ct. Rep. 373, and other cases, a percentage of gross earnings may be taken as a tax on property used in the business and properly may be deemed not to be a tax or burden on such earnings. But the practical operation of the section is to be regarded, and it is to be dealt with according to its effect. Frick v. Pennsylvania, 268 U. S. 473, 69 L. Ed. 1058, 42 A. L. R. 316, 45 Sup. Ct. Rep. 603; Panhandle Oil Co. v. Mississippi, (72 L. E. 517 Advance Opinions). Here the tax is one that can be laid upon receipts belonging to a natural person quite as conveniently as those upon a corporation."

Quaker City Cab Co. v. Pennsylvania, 72 L. Ed. at p. 609 Advance Opinions.

Contract or private carriers operating for hire between fixed termini or over regular routes on the public highways are not common carriers and therefore are not obliged to pay the tax in controversy.

Frost & Frost Trucking Co. v. Railroad Commission, 271 U. S. 583; 70 L. Ed. 1101, 47 A. L. R. 457, 46 Sup. Ct. Rep. 605.

Common carriers not operating over fixed termini or between regular routes are also excluded from this highway tax.

Both of these classes of carriers for hire use the public highways as freely as appellants, and in direct competition with them, yet they are not obligated to pay the tax. (R. p. 7, fol. 9.)

All motor truck operators carrying on business within municipalities and operating their trucks on call instead of on schedule are excluded from the tax. The answer may be made that they are rightly excluded since cities do not share in any portion of the tax collected from this source. That may be true as to all cities in California except the consolidated City and County of San Francisco. The boundaries of that city and county are identical as are all officials of the city and the county and municipal and county functions. (California Statutes of 1856, p. 145 and amendatory acts.) As one of the 58 counties of the state it is entitled to a proportion of the highway taxes collected from the appellants and other operators coming within the classification. The city and county of San Francisco is the second most populous county in the state, and we believe that this Honorable Court

will take judicial notice that the number of automobiles registered from that city and county is in reasonable proportion to its population. Hence a very substantial portion of the tax imposed under the legislation in question is allocated to the said City and County of San Francisco for the maintenance and repair of its public streets and highways, but not a cent thereof is contributed to that fund by the numerous trucking and draying companies operating motor vehicles on call within the said city and county. All they are obliged to pay are local taxes and state license fees the aggregate amount of which does not average in excess of 25% of the taxes paid by appellants. (R. p. 9, fol. 11.) This is an unreasonable and arbitrary discrimination. All who share in the substantial benefits of the tax, when the nature and character of their business is similar to those who are obliged to contribute, should likewise be made to contribute.

> "The guaranty was aimed at undue favor and individual or class privilege, on the one hand, and at hostile discrimination or the oppression of inequality, on the other. It sought an equality of treatment of all persons, even though all enjoyed the protection of due process. Mr. Justice Field, delivering the opinion of this court in Barbier v. Connolly, 113 U. S. 27, 28, 28 L. Ed. 923, 924, 5 Sup. Ct. Rep. 357, of the equality clause, said: 'Class legislation, discriminating against some and favoring others, is prohibited; but legislation which, in carrying out a public purpose, is limited in its application, if, within the sphere of its operaton, it affects alike all persons similarly situated, is not within the amendment.' In Hayes v. Missouri, 120 U. S. 68, 30 L. Ed. 578, 7 Sup. Ct. Rep. 350, the court speaking through the same

justice, said the 14th Amendment 'does not prohibit legislation which is limited either in the objects to which it is directed or by the territory within which it is to operate. It merely requires that all persons subjected to such legislation shall be treated alike, under like circumstances and conditions, both in the privileges conferred and in the liabilities imposed.' Thus, the guaranty was intended to secure equality of protection not only for all, but against all similarly situated. Indeed, protection is not protection unless it does so. Immunity granted to a class, however, limited, having the effect to deprive another class, however limited, of a personal or property right, is just as clearly a denial of equal protection of the laws to the latter class as if the immunity were in favor of, or the deprivation of right permitted worked against, a larger class."

Truax v. Corrigan, 257 U. S. 312, 66 L. Ed. 254, 42 Sup. Ct. Rep. 124.

The difference between the taxes paid by excluded carriers and that paid by carriers subject to the tax is so palpably unfair and discriminatory that it should be apparent that plaintiffs are denied the equal protection of the laws.

"The gross receipts of incorporated operators are taxed while that of natural persons and partnerships carrying on the same business are not. The character of the owner is the sole fact on which the distinction and discrimination are made to depend. The tax is imposed merely because the owner is a corporation. *The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed.* It follows that the section fails to meet the requirement that a classification to be consistent with the equal protection clause must be based on a real and substantial

difference having reasonable relation to the subject of the legislation. Power Mfg. Co. v. Saunders, supra. No decision of this court gives support to such a classification. In no view can it be held to have more than an arbitrary basis."

Quaker City Cab Co. v. Pennsylvania, 72 L. Ed. at 609, Advance Opinions, decided May 28, 1928.

Furthermore the constitutional amendment and the statute enacted to carry same into effect arbitrarily discriminate between common carriers transporting freight and those transporting passengers. The former are taxed 5% on their annual gross receipts while the latter are only taxed 4¼%. (App. p. xvi.) There is no reasonable basis for such discrimination.

"The discrimination is not justified by any difference in the source of the receipts or in the situation or character of the property employed."

Quaker City Cab Co. v. Pennsylvania, supra.

"Discriminations of an unusual character especially suggest careful consideration to determine whether they are obnoxious to the constitutional provision."

Louisville Gas & Electric Co. v. Coleman, 72 L. Ed. at p. 488, Advance Opinions, decided Apr. 30, 1928.

(b) *The carriers for hire not subject to the tax do not pay an equivalent in other taxes.*

It is alleged in appellants' verified bill, (Par. X, R. p. 9), and deemed admitted on these proceedings, that the average total annual rate or percentage of taxes that carriers not subject to said highway tax

operating for hire on the public highways of said state are obliged to pay, which percentage includes all local, municipal, county and state taxes and licenses of every kind combined, does not exceed five per centum (5%) of the full cash or assessable value of said property used exclusively in the operation of the business of carriers as aforesaid, and that said rate or percentage would apply to these appellants on their property used exclusively in the operation of the business of carriers if said highway tax were not assessed, levied and enforced.

It is further alleged in appellants' bill, and admitted, that the average full cash value of the operative property, that is to say, of all property used exclusively in the business of motor vehicle carrier by *all classes* of carriers transporting property for hire over the public highways of California is not in excess of one-fourth (¼) or twenty-five *percentum* (25%) of the annual gross receipts derived from such business by said carriers. In other words the annual gross receipts of the carriers is four times greater than the full cash value of the property used in creating those receipts. (R. p. 9, Par. IX.) Every four years the state would collect an aggregate of highway taxes equal to the full cash value of the property of the operators, most of which property is subject to rapid depreciation if not disintegration and is almost continually requiring repairs and replacements.

As the total combined annual taxes and license fees paid by the competitors of appellants do not

exceed 5% of the full cash value of their operative property, the appellants are obliged to pay four times the amount of annual taxes paid by the said competitors.

We do not believe a research of all the books reporting tax litigation will reveal a case of more oppressive, arbitrary and discriminatory taxation.

As applied to this situation no language is more appropriate than that used by this Court in the case of *Cotting v. Goddard,* 183 U. S. 79, 46 L. Ed. 92, 111, where this Court said:

> "But while recognizing to the full extent the impossibility of an imposition of duties and obligations mathematically equal upon all, and also recognizing the rights of classification of industries and occupations we must nevertheless always remember that the equal protection of the laws is guaranteed, and that *such protection is denied when upon one of two parties engaged in the same kind of business and under the same conditions burdens are cast which are not cast upon the other* * * * If such legislation does not deny the equal protection of the laws, we are unable to perceive what legislation would."

CONCLUSION.

We submit that the decree denying the motion for an interlocutory injunction and granting the motion to dismiss is erroneous, and that the same should be reversed, with directions to the lower court, consisting of three judges, to grant the interlocutory and permanent injunctions prayed for against the appellee; and decreeing that said Section 15 of Article XIII of the Constitution

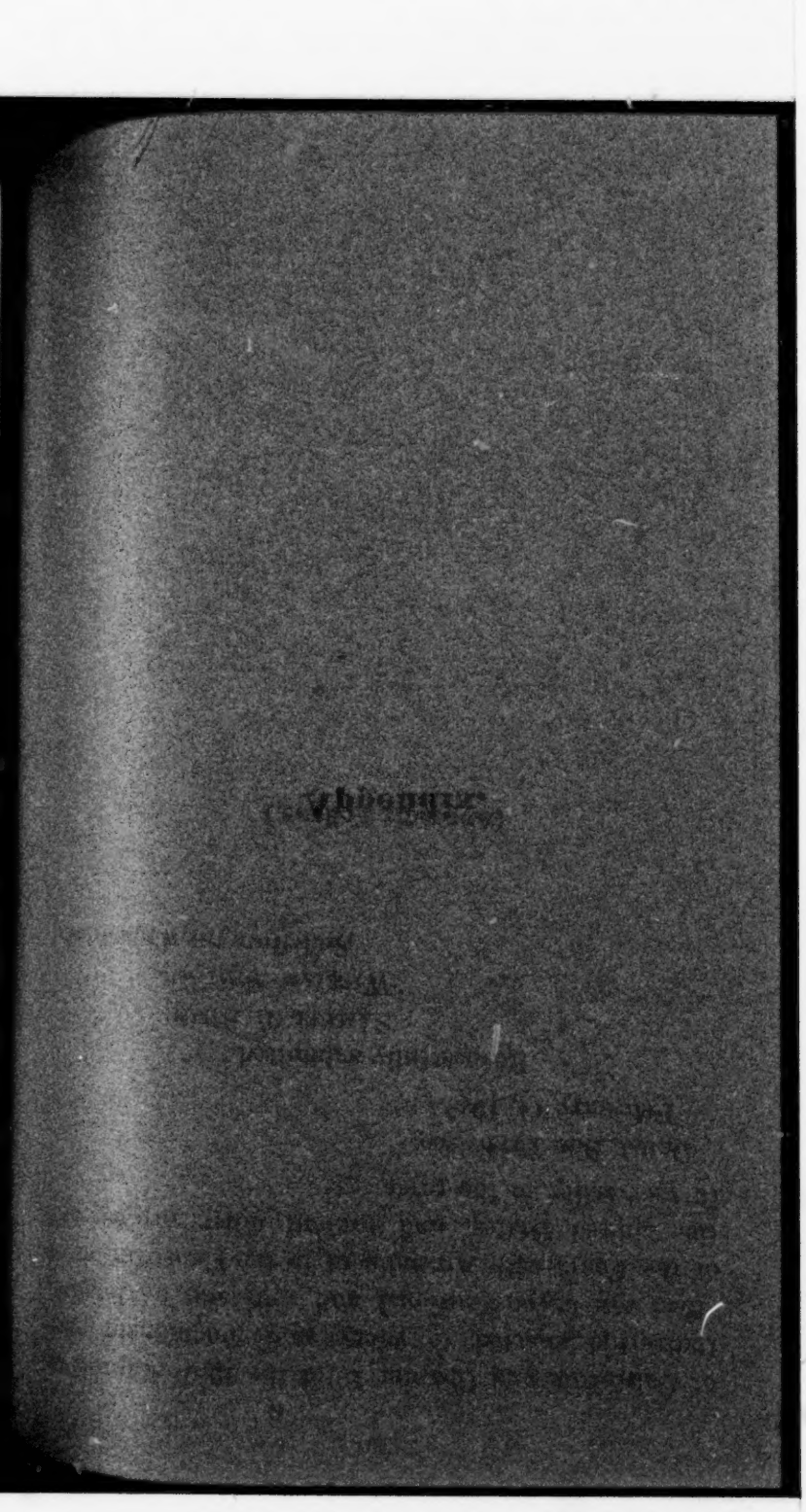
of California and Chapter 19 of the 1927 Statutes of California enacted to carry said amendment into effect are unconstitutional and void and a violation of the Fourteenth Amendment to the Constitution of the United States, and for all other proper and further relief in the premises.

Dated, San Francisco,
February 14, 1929.

Respectfully submitted,
SAMUEL T. BUSH,
WILLIAM SEA, JR.,
Solicitors for Appellants.

(Appendix Follows.)

Appendix.



Appendix

(Chapter 412, p. 833, 1925 Statutes of California.)

An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads and highways in the State of California by motor vehicle; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purpose of this act; and to repeal all acts or parts of acts in conflict herewith.

[Approved by the Governor, May 23, 1925.]

The people of the State of California do enact as follows:

Section 1. The words and phrases used in this act shall for the purposes of this act, unless the same be contrary to or inconsistent with the context, be construed as follows:

(a) The phrase "railroad commission certificate" shall be construed to mean a certificate of public convenience and necessity granted or issued by the railroad commission of the State of California, authorizing a common carrier by motor vehicle to operate under the conditions prescribed by said commission, and shall also include all amendments to or changes in such certificate which may be made by said commission.

(b) The word "operator" shall include all persons, firms, associations and corporations who operate

motor vehicles upon any public highway in this state and thereby engage in the transportation of persons or property for hire or compensation, but shall not include any person, firm, association or corporation who solely transports by motor vehicle persons to and from or to or from attendance upon any public school or who solely transports his or its own property, or employees, or both, and who transports no persons or property for hire or compensation, but all persons operating freight carrying vehicles so exempted shall be required to obtain from the state board of equalization and to display exempt emblems in the manner hereinafter provided.

(c) The term "registration certificate" shall include any and all certificates of registration of a motor vehicle issued by the division of motor vehicles of the department of finance of the State of California, or by any governmental body within said state under which the laws of the said state may have power or authority to register and certify to the registration of a motor vehicle for operation within said state.

(d) The word "motor vehicles" shall mean and include all vehicles, automobiles, trucks or trailers operated upon or over public highways of this state whether the same be propelled or operated by steam or electricity, or propelled or operated by combustion of gasoline, distillate or other volatile and inflammable liquid fuels.

(e) The term "gross receipts from operation" shall include all receipts from the operation of such

motor vehicle or vehicles beginning and ending entirely within this state and a proportion based upon the proportion of the mileage within this state to the entire mileage over which such business is done of gross receipts by such operator on all business passing through, into or out of this state, or partly within and partly without this state, it being the intention hereof not to base all or any portion of the license fee hereby imposed upon any receipts from interstate commerce, or upon the right or privilege to engage in interstate commerce.

Sec. 2. Each operator of a motor vehicle within this state who transports or desires to transport for compensation or hire persons or property upon or over any public highway within the state shall apply to and secure from the board of equalization of the State of California a license to operate each and all of the motor vehicles which such operator desires to operate or which such operator from time to time may operate.

Sec. 3. Such license must be issued upon the filing with said board of a verified application by the applicant or his or its duly authorized agent in the form to be prescribed by said board. Said board shall transmit to the state controller each month a list of the operators of motor vehicles securing licenses from it under the provisions of this act, together with the amount of tax collectible from each operator.

Sec. 4. Within twenty days after the end of each quarter of the calendar year such applicant shall file with the state board of equalization a report upon forms to be provided by that board showing such

information relating to its operations as that board may require to enable it to make the assessment herein provided for, provided, that if any operator refuses or neglects to make the report herein required within twenty-five days after the close of any quarter, then the state board of equalization shall from its best information make an arbitrary assessment for such operator. If it shall appear from a report thereafter filed for such quarter that the arbitrary tax so fixed is in excess of the amount actually due then the state board of equalization shall be authorized to give such operator a credit upon his next quarterly report of a sum which will reduce such excess to not less than twenty-five per cent more than the amount actually found to be due, and such operator shall within thirty-five days after the end of each quarter pay to the state controller of the State of California an amount equal to four per cent of said applicant's gross receipts from operation derived by such applicant from the operation of such motor vehicles during the preceding quarter; provided, that there shall be deducted from said four per cent of the gross receipts the amount of any county or municipal licenses, and any city, or county or city and county taxes paid by such operators to any city, or county or city and county in this state upon any of the property actually used and necessary in the operation of such motor vehicles for the transporation of persons or property and upon such payment said state controller shall issue a receipt, in duplicate, to such applicant.

Sec. 5. Said board of equalization shall have the power and authority to prescribe the forms of all

reports of gross receipts from operation necessary to enable it or the state authorities to determine the amount and character thereof, and shall have power to subpoena witnesses duces tecum at any point within the State of California, and the state controller shall have the power to request the attorney general of said state to bring suit for the recovery of any unpaid license fee and costs. It shall be the duty of the attorney general to bring such suit on the written request of said state controller and in the name of said people of the State of California in a court of competent jurisdiction in the county of Sacramento; payment of an amount to said state controller for and on account of such license fee and the acceptance thereof shall not bar an action by the state to recover an additional amount for the same quarter which may actually be due. Any license holder may pay to the state controller all or any portion of the license fee hereby imposed under written protest and may bring an action against the state treasurer in his official capacity in the superior court of the State of California in and for the county of Sacramento, and obtain a judgment that said license fee has been in whole or in part illegally or unlawfully exacted or collected, and said judgment may be made the basis for an appropriation by the legislature of said state to reimburse said license holder, or his, or its, heirs, executors, successors, administrators or assigns, in the amount of said judgment without interest or costs.

Sec. 6. Upon the issuance of a license by said board of equalization to an operator of a motor vehicle or vehicles said board shall furnish to such operator

duplicate emblems or plates for each motor vehicle desired to be operated by such operator under such license, which emblems shall be attached to and conspicuously displayed upon each of the motor vehicles, authorized to be operated by said license, in the same manner as is required for motor vehicle registration license plates. Said emblems shall be numbered in pairs. Each pair shall bear a different number and said board shall keep a record of the emblems so issued, with the date of issuance, and the name of the operator to whom said emblems may be issued. Said board shall charge and collect from such operator the cost to the state of the manufacture and delivery to said board of such emblems and actual costs of mailing to licensee if not called for. There is hereby appropriated out of any moneys in the motor vehicle fuel fund, not otherwise appropriated, the sum of five thousand dollars for the purpose of designing, preparing and securing such emblems; said money to be expended by said board on warrants drawn in the manner provided by law, and said amount to be a revolving fund into which shall be paid from time to time as they are collected the amounts received from operators of motor vehicles for said emblems and the legislature may from time to time withdraw from said fund such amounts as it may deem proper; provided, that said fund shall not be decreased below the sum of five thousand dollars. There is also hereby appropriated out of said motor vehicle fuel fund the sum of twenty thousand dollars annually, or so much thereof as may be necessary, to be used by the state board of equalization to carry out the provisions of this act.

Sec. 7. Any person, firm, association, or corporation who shall use any public highway in this state for the transportation of persons or property for hire, either as a public or a private carrier, without first obtaining the license herein provided for, or without carrying upon each motor vehicle so used the emblems herein provided for, or who fails, neglects or refuses to make any return hereunder or any report required by the state board of equalization, or who makes any false return, and any person exempt from this tax who so neglects or refuses to obtain and display exempt emblems as required in subdivision (b) hereof, shall be guilty of a misdemeanor and shall be punishable by a fine not exceeding five hundred dollars or by imprisonment not exceeding six months, or by both such fine and imprisonment. Any such operator of a motor vehicle who holds a California railroad commission certificate entitling him or it to operate as a common carrier and who fails, neglects or refuses for the period of thirty-five days from the end of any quarter of the calendar year to pay the license fee hereby imposed shall have his or its certificate revoked by said railroad commission, and it shall be mandatory upon said railroad commission to revoke said certificate upon written complaint to it by said board of equalization that said operator has for the period of thirty days failed, neglected or refused to pay such license fee, and said revocation shall be in addition to and independent of the penalty for misdemeanor herein prescribed; provided, that no such written complaint shall be made by such board until after notice by registered mail or personal service has been given

such operator and he has had an opportunity to be heard thereon. If any such operator of a motor vehicle shall fail, neglect or refuse for the period of thirty days next succeeding the end of any quarter of a calendar year to pay the license fee hereby imposed, the division of motor vehicles of the department of finance of the State of California shall upon written complaint of said board of equalization and upon ten days notice to such operator, suspend, until the payment of said license fee is made, any and all registration certificates held by such operator for any motor vehicles employed by him or it in the business of transportation of persons or property upon the highways of this state for hire.

Sec. 8. All sums paid to the state controller under and by virtue of this act, shall be deposited by him in the state treasury to the credit of the motor vehicle fuel fund, subject to the provisions of section six hereof and the balances thereof shall be applied and the same are hereby appropriated one-half to the State of California to be devoted exclusively to the maintenance and repair of public highways within this state; the remaining one-half shall be apportioned among the respective counties of this state, in the proportion that the number of motor vehicles registered within such county for the preceding calendar year bears to the total number of motor vehicles registered in the State of California under the motor vehicle act of such state for the preceding year and such sums so paid to said counties shall be devoted exclusively to the maintenance and repair of the public highways within such county; provided, that

from any sums found to be due to any county under the provisions of this act there shall first be deducted the total of all county and city licenses collected in such county from the operators covered by the provisions hereof and any county, and city and county or city taxes collected upon the operative property of such operators within such county. All such sums so deducted shall revert to the counties' portion of the motor vehicle fuel fund and shall be apportioned to the several counties in the proportion herein provided.

Sec. 9. This act shall not apply to hotel busses meeting trains or boats, nor to taxicabs, drays, transfer vehicles and other like city motor vehicles operating within incorporated cities or towns or the usual transfer delivery zone adjacent thereto, nor shall it apply to such vehicles operating between incorporated cities or towns where no portion of any state or county highway is traversed in said operation.

Sec. 9½. Nothing in this act shall be construed to apply to nor to levy a license upon that part of the gross income from the operation of any motor vehicle earned on account of carrying United States mail or parcels post under any contract with the United States government entered into prior to the first day of May nineteen hundred twenty-five.

Section 10. All acts and parts of acts in conflict herewith are hereby repealed; provided, however, that nothing herein shall be construed as affecting or repealing the provisions of an act entitled "An act providing for the supervision and regulation of the transportation of persons and property for compensa-

tion over any public highway by automobiles, jitney busses, auto trucks, stages and auto stages; defining transportation companies and providing for the supervision and regulation thereof by the railroad commission; providing for the enforcement of the provisions of this act and for the punishment of violations thereof; and, repealing all acts inconsistent with the provision of this act," approved May 10, 1917, as amended.

Sec. 11. An act entitled "An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads, and highways in the State of California by motor vehicle; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purposes of this act, and to repeal all acts or parts of acts in conflict herewith," approved June 13, 1923, is hereby repealed.

Sec. 12. If any section, subsection, sentence, clause or phrase of this act is for any reason held to be unconstitutional such decision shall not affect the validity of the remaining portions of this act. The legislature hereby declares that it would have passed this act and each section, subsection, sentence, clause and phrase thereof, irrespective of the fact that any one or more of the sections, subsections, clauses or phrases be declared unconstitutional.

(Chapter 843, p. 1708, 1927 Statutes of California.)

An act to repeal that certain act entitled "An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads and highways in the State of California by motor vehicles; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purpose of this act; and to repeal all acts or parts of acts in conflict herewith," approved May 23, 1925.

(Approved by the Governor May 31, 1927.

In effect Jan. 1, 1928.)

The people of the State of California do enact as follows:

Section 1. An act entitled "An act to impose a license fee for the transportation of persons or property for hire or compensation upon public streets, roads and highways in the State of California by motor vehicle; to provide for certain exemptions; to provide for the enforcement of the provisions hereof and for the disposition of the amounts collected on account of such licenses; to make an appropriation for the purpose of this act; and to repeal all acts or parts of acts in conflict herewith," approved May 23, 1925, is hereby repealed.

Sec. 2. This act shall become effective on the first day of January in the year 1928.

(Chapter 60, p. 1386, 1925 Statutes of California.)

Assembly Constitutional Amendment No. 37—Proposed amendment to article thirteen of the constitution, relative to taxation.

(Adopted by vote of the people at regular state election, November 2, 1926.)

(Filed with Secretary of State April 27, 1925.)

Resolved by the assembly, the senate concurring, That the legislature of the State of California, at its forty-sixth regular session commencing on the fifth day of January, one thousand nine hundred and twenty-five, two-thirds of all the members elected to each of the two houses of said legislature voting in favor thereof, hereby proposes to the people of the State of California that a new section to be called section fifteen is hereby added to article thirteen of the constitution of the State of California, said section to read as follows:

Sec. 15. Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school districts, shall be entirely and exclusively for highway purposes, and shall be levied, assessed and collected in the manner hereinafter provided. The word "com-

panies," as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.

(a) All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state.

When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; provided, that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state.

The revenues from the taxes provided for in this section shall be deposited in the general fund and shall be applied and the same are hereby appropriated one-half to the State of California to be devoted exclusively to the maintenance and repair of public highways within this state; the remaining one-half shall be apportioned among the respective counties of this state, in the proportion that the number of motor vehicles registered within such county for the preceding calendar year to the total number of motor vehicles registered in the State of California under the motor vehicle act of such state for the preceding year, and such sums so paid to said counties shall be devoted exclusively to the maintenance and repair of public highways within such county. In the event that all other state revenues are at any time deemed insufficient to meet the annual expenditures of the state, there may be levied in the manner to be provided by law, a tax, for state purposes, on all the property in the state, including the classes of property enumerated in this section, sufficient to meet the deficiency. All property enumerated in this section shall be subject to taxation, in the manner provided by law, to pay the principal and interest of any bonded

indebtedness created and outstanding by any city, city and county, county, town, township, or district on the first day of October, one thousand nine hundred twenty-five. The taxes so paid for principal and interest on such bonded indebtedness shall be deducted from the total amount paid in taxes hereunder.

(b) All the provisions of this section shall be self-executing, and the legislature shall pass all laws necessary to carry this section into effect, and shall provide for the valuation and assessment of the property enumerated in this section, and shall prescribe the duties of the state board of equalization and any other officers in connection with the administration thereof.

The rates of taxation fixed in this section shall remain in force until changed by the legislature, two-thirds of all the members elected to each of the two houses voting in favor thereof. The taxes herein provided for shall become a lien on the first Monday in March of each year after the adoption of this section and shall become due and payable on the first Monday in July thereafter. The gross receipts herein mentioned shall be computed for the year ending the thirty-first day of December prior to the levy of such taxes and the value of any property mentioned herein shall be fixed as of the first Monday in March. Nothing herein contained shall affect any tax levied or assessed prior to the adoption of this section.

(c) No injunction shall ever issue in any suit, action or proceeding in any court against this state or against any officer thereof to prevent or enjoin the

collection of any tax levied under the provisions of this section; but after payment action may be maintained to recover any tax illegally collected in such a manner and at such time as may now or hereafter be provided by law.

(Chapter 19, p. 17, 1927 Statutes of California.)

An act to add three new sections to the Political Code to be numbered three thousand six hundred sixty-four aa, three thousand six hundred seventy bb and three thousand six hundred seventy cc, relating to taxation of highway transportation companies for state purposes.

(Approved by the Governor March 5, 1927.
In effect immediately.)

The people of the State of California do enact as follows:

Section 1. A new section is hereby added to the Political Code to be numbered 3664aa, to read as follows:

3664aa. 1. Taxes levied, assessed and collected as hereinafter provided upon companies owning, operating or managing any automobile, truck or auto truck, jitney bus, stage or auto stage used in the business of transportation of persons or property as a common carrier for compensation over any public highway in this state between fixed termini or over a regular route, other than busses used exclusively for the transportation of pupils to or from any public school, when owned or operated by the school or school district shall be entirely and exclusively for highway purposes, and shall be assessed and levied by the state

board of equalization and collected in the manner hereinafter provided. The word "companies," as used in this section, shall include persons, partnerships, joint stock associations, companies and corporations.

2. All such companies engaged in the business of transportation of persons, or persons and baggage, or persons and express, or persons, baggage and express where the same is transported on the same automobile, jitney bus, stage or auto stage transporting said persons shall annually pay to the state a tax upon their franchises, cars, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to four and one-quarter per cent of the gross receipts from operations of such companies, and each thereof, within this state.

3. All such companies operating trucks or auto trucks engaged in the business of transporting property shall annually pay to the state a tax upon their franchises, trucks, or auto trucks, equipment, and other property, or any part thereof, used exclusively in the operation of their business in this state, equal to five per cent of the gross receipts from operations of such companies, and each thereof, within this state.

4. When such companies are operating partly within and partly without this state, the gross receipts within this state shall be deemed to be all receipts on business beginning and ending within this state, and a proportion, based upon the proportion of the mileage within this state to the entire mileage over which such business is done, of receipts on all business passing through, into, or out of this state.

5. Such taxes shall be in lieu of all other taxes and licenses, state, county and municipal, upon the property above enumerated of such companies; *provided,* that nothing herein shall be construed to release any such company from the payment of any amount to be paid or required by law to be paid for any special privilege or franchise heretofore granted by any of the municipal authorities of this state.

6. The provisions of sections 3664e, 3665a, 3665b, 3665c, 3666, 3666c, 3667a, 3667b, 3667c, 3668, 3668a, 3668b, 3668c, subdivisions two, three and four of section 3669, 3669a, 3669b, 3669c and 3669e of the Political Code and any amendments thereto hereafter made, shall apply, and shall be construed to apply, to all "companies" subject to state taxation under section 15 of article XIII of the constitution of this state, with the same force and effect as if said companies were expressly mentioned in said sections of the Political Code.

Sec. 2. A new section is hereby added to the Political Code to be numbered 3670bb, said section to read as follows:

3670bb. 1. Each county, city and county, city and district assessor must segregate on his assessment roll, as directed by the state board of equalization, the assessments made by said assessors of all property enumerated in section 15 of article XIII of the constitution of this state, which is located in the county, or city and county, or any city, town, township, or district in which it is subject to taxation, for paying the principal and interest of any bonded indebtedness

created and outstanding by any city, city and county, county, town, township or district prior to the second day of October in the year 1925, as provided in section 15 of article XIII of the constitution of this state.

2. Immediately upon completion of the assessment and equalization of property for the purposes of taxation in each year, the auditor or clerk of each county, city and county, city, town, or district must transmit to the state board of equalization a duplicate of that part of the assessment roll containing the assessments referred to in subdivision one of this section.

3. Whenever the state board of equalization is satisfied after investigation that any county, city, or other assessor, or board of equalization, has assessed for taxation to pay the principal and interest of any bonded indebtedness created and outstanding by any county, city and county, city, town, township, or district prior to the second day of October in the year 1925, as provided in section 15 of article XIII of the constitution of this state, any of the property taxed exclusively for state purposes as provided in said section, above its full cash value and has thereby unjustly reduced the amount of taxes due the state on such property, said state board shall, under such rules of notice to the clerk of the board of supervisors of the county, or city and county, or to the city clerk of the city affected thereby, as the board shall deem reasonable, equalize the assessed value of such property, and shall issue an order to said assessor or board of equalization and to the county or city auditor or clerk of the county, city and county, or city in which

the property is located, fixing the assessed value of such property.

4. The value so equalized and no other, shall be deemed the value of said property, and its assessment for taxes levied to pay the principal and interest of any such outstanding bonded indebtedness.

5. When making the tax levy and fixing the rates of taxation for county, city and county, city, town, township, or district purposes, the board of supervisors of any county, or city and county and the corresponding authority in any city having bonded indebtedness issued and outstanding on the first day of October in the year 1925, shall fix the tax rate for such bonded indebtedness separate and apart from all other tax rates whether for subsequent bonded indebtedness or for other purposes.

6. The county, city and county, or city auditor or clerk shall extend on the assessment roll against the assessments segregated as herein provided, the taxes necessary to pay the principal and interest of said bonded indebtedness at the same rate as said taxes for payment of principal and interest of said outstanding bonded indebtedness shall be levied upon the other classes of property within the same county, city and county, city, town, township or district, and the amount of each such taxes shall be certified by said auditor or clerk to the controller, and the amount so certified shall then be credited by the controller to the county, city and county, city, town, township or district to which it is due; and said amount shall be paid by said controller to the treasurer of such county,

or city and county, as provided in section 3670cc of this code, and upon such payment said treasurer shall forthwith certify such fact to the auditor who shall thereupon mark upon the assessment roll the date of payment and the words "paid by the state treasurer." The city clerk or auditor shall in the certificate mentioned in this paragraph also state the date when taxes in such city shall become delinquent.

Sec. 3. A new section is hereby added to the Political Code to be numbered 3670cc, said section to read as follows:

3670cc. 1. All taxes assessed and levied under the provisions of section 15 of article XIII of the constitution of this state and sections of this code applicable thereto shall be paid to the state treasurer, upon the order of the controller, without deduction for any taxes assessed and levied to pay the principal and interest of any bonded indebtedness mentioned in section 15 of article XIII of the constitution of this state, and the amount due to the cities, cities and counties, counties, towns, townships and districts, on account of said taxes assessed and levied for such bonded indebtedness shall be paid to said cities, cities and counties, counties, towns, townships or districts, in the manner provided by law. The controller must mark the date of payment of any tax on the record of assessments for state taxes.

2. The controller, out of the taxes collected by him under the provisions of section 15 of article XIII of the constitution of this state and the provisions of the sections of this code applicable thereto, shall credit

to the fund created by an act of the thirty-ninth session of the legislature entitled: "An act appropriating money for the purpose of payment of that part of the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district on the eighth day of November in the year 1910, which is provided for in section 14 of article XIII of the constitution of this state, and as provided in an act of the thirty-ninth session of the legislature entitled: 'An act to carry into effect the provisions of section 14 of article XIII of the constitution of the State of California as said constitution was amended November 8, 1910, providing for the separation of state from local taxation and providing for the taxation of public service and other corporations for the benefit of the state, all relating to revenue and taxation,'" or any act or acts amendatory thereof or supplementary thereto, the money due to each county, city and county, city, town, township or district on account of taxes to pay the principal and interest of any bonded indebtedness created and outstanding by any city, city and county, county, town, township or district, on the first day of October in the year 1925.

3. The controller, in the months of October and March in each year shall settle with the treasurer of each county and city and county for the money collected by said controller under this section, for the moneys due said county or city and county and the townships and districts within such county, or city and county, in the same manner as settlements are

made between the county or city and county treasurers and the controller as provided for in section 3866 of this code.

4. The controller shall settle, at the same times, with each city and town for the moneys due such city or town for the purposes mentioned in this section, and when ready for such settlement shall notify the city or town treasurer of the amount of money due the city or town for said purposes, and that upon receipt of proper authority so to do, he will forward to said city or town treasurer a warrant for the amount thereof; *provided, however,* that upon receipt of notice from any such city or town treasurer that any bond issue matures for principal or interest before the date of such settlement, which notice shall state the amount thereof due from the state, and the date of maturity, and that said amount due from the state is required in order to pay the same, the said state controller must, before said date of maturity, forward his warrant to such city or town treasurer in the manner above provided for the amount ascertained by him to be due. The treasurer of the county or city and county shall forthwith, upon receipt by him of the moneys so hereinbefore directed to be paid by said controller, credit the amount so received by him to the county, city and county, township or district, respectively entitled thereto, and pay the same in the manner provided by law.

5. Any excess paid by the controller to a county, city and county, city, town, or to a county or city and county or any township or district, over and above the

state's share of the amount actually expended by such county, city and county, city, town, township or district, to pay the interest and principal of said bonded indebtedness in any year, shall be repaid to the state in such manner as the controller shall direct.

Sec. 4. This act, inasmuch as it provides for a tax levy, shall, under the provisions of section 1 of article IV of the constitution, take effect immediately.